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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TREVAR SHYSHKA, Defendant and Appellant.	H032708 (Santa Clara County Super. Ct. No. CC784892)

I. STATEMENT OF THE CASE

Defendant Trevar Shyska pleaded no contest to possession of methamphetamine for sale, being under the influence of methaphmetamine, and destroying or concealing evidence and admitted that he had previously suffered a prior strike conviction and served a prior prison term. (Health & Saf. Code, §§ 11378, 11550, subd. (a); Pen. Code, §§ 135, 1170.12, 667.5, subd. (b).)[1] The court sentenced him under the three-strikes law to an aggregate term of three years and eight months. Among other fines and fees, the court ordered him to pay $200 to reimburse the county for the services of the public defender. (§ 987, subd. (b).)

On appeal from the judgment, defendant claims the court erred in ordering him to pay attorney fees.

[1] All further unspecified statutory references are to the Penal Code.

We affirm the order.

II. BACKGROUND[2]

Defendant was born in 1977 and was 30 years old when arrested. At the time, he was living with his mother and stepfather. He has a lengthy criminal history, including four felony convictions, for which he served two prison terms. He committed the instant offenses while on parole. At that time, he had been working in construction for eight months, earning $26 per hour.

The probation report recommended that the court impose various fees and fines and order defendant to pay "[a]ttorney fees if appropriate."

As noted, the court ordered him to pay $200 in attorney fees.

III. DISCUSSION

Defendant contends that the fee award must be reversed because (1) there was no noticed hearing on attorney fees, (2) there was no evidence presented below concerning his ability to pay, and (3) the record does not support a finding of ability to pay.

Section 987.8 provides, in relevant part, that "the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost" of legal assistance provided by "the public defender or private counsel appointed by the court . . . ." (*Id.*, subd. (b).) The determination that a defendant has the ability to pay is a prerequisite for entry of an order that defendant pay all or part of the cost. (*Id.*, subd. (e).)

" 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial

[2] The Attorney General accurately summarizes the facts that led to defendant's arrest and support his plea. Given the issue raised on appeal, we need not recount those facts here.

position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (§ 987.8, subd. (g)(2).)

"If the court determines that the defendant has the present ability to pay all or a part of the cost [of appointed counsel], the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (§ 987.8, subd. (e).)

A finding that a defendant has the ability to pay need not be express but may be implied through the conduct and content of the hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71-72 (*Phillips*).) The order, whether express or implied, will be upheld if it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.) On appeal, we "draw all reasonable inferences in favor of the judgment" or in this case the court's determination of defendant's ability to pay. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 467.)

Initially, the Attorney General argues that defendant forfeited his claims because he failed to object to the fee order at sentencing. We disagree.

The general rule is that only those claims raised in the trial court and preserved by the parties are reviewable on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) However, there is an exception to the rule that applies in this case.

In *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), the defendant challenged the trial court's order to pay fees under section 987.8. He claimed that he did not receive adequate notice of the fee hearing, the hearing itself was inadequate, there was insufficient evidence to support findings concerning his ability to pay, and the amount of fees was excessive and not supported by the actual cost of counsel's representation. (*Id.* at pp. 1213-1214.) As here, the Attorney General argued that the defendant forfeited those claims by failing to object at sentencing. In rejecting this argument, this court reasoned that forfeiture may not properly "be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*. It seems obvious to us that when a defendant's attorney stands before the court asking for an order taking money from the client and giving it to the attorney's employer, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel's omissions to the client. In such a situation the attorney cannot be viewed, and indeed should not be permitted to act, as the client's representative. Counsel can hardly be relied upon to contest an order when a successful contest will directly harm the interests of the person or entity who hire him and to whom he presumptively looks for future employment." (*Id*. at pp. 1215-1216, italics in *Viray*.) Thus, unless the defendant "has secured a new, independent attorney when such an order is made, she is effectively *unrepresented* at that time, and cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his [or her] own fees." (*Id.* at p. 1214.)[3]

Additionally, we concluded that "no predicate objection in the trial court" is ever required to challenge the *sufficiency* of the evidence regarding the defendant's ability to

[3] In reaching this conclusion we distinguished *Phillips, supra,* 25 Cal.App.4th 62, in which we concluded that the failure to object at sentencing to an order requiring payment of probation costs forfeited any claim concerning the lack of a separate, formal hearing on that issue. (*Id*. at p. 70; *Viray, supra,* 134 Cal.App.4th at pp. 1214-1216.)

pay attorney fees. (*Viray*, *supra*, 134 Cal.App.4th at p. 1217, italics added; see also *People v. Butler* (2003) 31 Cal.4th 1119, 1126 [no objection needed to preserve claim of insufficient evidence to support finding or probable cause for HIV testing]; *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [challenge to sufficiency of evidence cannot be waived]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 ["In the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal"].)

Turning to the merits of the defendant's claims, we concluded that there was insufficient evidence to support findings concerning the defendant's ability to pay and the cost of representation. (*Viray*, *supra*, 134 Cal.App.4th at pp. 1217-1218.) Given our conclusion, we did not address the merits of defendant's other claims concerning the adequacy of notice and hearing.[4] (*Viray*, *supra*, 134 Cal.App.4th at p. 1214.)

The Attorney General argues that *Viray* is distinguishable because in that case, defense counsel requested an assessment of attorney fees, whereas here, the probation report recommended fees if appropriate. However, that distinction makes no legal difference. Regardless of who initiates the request for fees, a defendant should not suffer the forfeiture of colorable claims because conflicted counsel remained mute when they were imposed.

The Attorney General challenges the notion that at sentencing there is a conflict between appointed defense counsel and a client concerning reimbursement for attorney fees. The Attorney General argues that counsel's representation is not "measured by the amount that a court later determines should be reimbursed to the county . . . . Money is budgeted and used for either public defender's offices or appointed counsel to provide effective assistance of counsel." Insofar as the Attorney General is arguing that there is

[4] Although we declined to address the merits of those claims, we did not suggest that defendant had forfeited them.

no conflict because the public defender will be paid regardless of whether the defendant is required to reimburse the county, we disagree. A challenge can encompass the *amount* of fees as was the case in *Viray*. Certainly, there is an implicit conflict between appointed counsel and his or her client on the question of whether or not a particular amount of fees is reasonable or excessive.

The Attorney General argues that when pushed to its "logical extension," the analysis in *Viray* could require repeated hearings on reimbursement—i.e., once new counsel is appointed on the initial hearing for reimbursement, new counsel would also have to be appointed in a hearing on reimbursement for the legal representation in the prior reimbursement hearing, and so on. Thus, the appointment of new counsel and the holding of new hearings on the issue of reimbursement could go on endlessly. However, we perceive no such potential problem because a defendant is not entitled to counsel at a reimbursement hearing, and therefore the defendant could represent him or herself at any subsequent hearings.

Finally, we note that the Attorney General does not challenge our conclusion in *Viray* that a failure to object does *not* waive claims concerning the sufficiency of evidence.

In sum, we do not find that defendant forfeited his appellate claims by failing to object below.

Turning to the merits of those's claims, we first disagree that there was no noticed hearing.

In *Phillips*, *supra*, 25 Cal.App.4th 62, the trial court ordered the defendant to pay $150 in fees at the sentencing hearing. On appeal the defendant complained that the court had failed to give him oral or written notice that a hearing on fees would take place at sentencing. (*Id.* at pp. 73-74.) In rejecting this claim, we noted that the probation report had recommended attorney fees " 'if appropriate.' " (*Id.* at p. 66.) We opined that this reference rendered fee reimbursement among the various issues to be considered at

sentencing. (*Id.* at p. 74.) Accordingly, we concluded that the reference "constituted notice *reasonably calculated, under all the circum*stances, to apprise defendant that the matter would be taken up in the context of the sentencing hearing." (*Ibid*., italics in *Phillips*.) We found support for our conclusion in the fact that recommendations for restitution in a probation report satisfy the due process right to notice about restitution and an opportunity to challenge such recommendations. (*Id*. at pp. 74-75.)[5]

Concerning the adequacy of the hearing itself, we found no authority prohibiting a court from determining a defendant's ability to pay at a sentencing hearing. We observed that the statute did not mandate a separate hearing or otherwise prohibit consideration of fees during the sentencing process. Moreover, we opined that permitting a court to do so "is also consistent with the general purpose of the statute at issue, i.e., to conserve the public fisc. In sum, based on the language of the statute and sound policy considerations, we perceive no valid basis for construing the statute as requiring the expenditure of additional public funds by requiring all of the interested parties to reconvene before the court at a later date." (*Phillips, supra*, 25 Cal.App.4th at p. 76.)

Here, the probation report made various recommendations concerning the disposition of this case at the sentencing hearing. Along with recommendations concerning the length of sentence and the imposition of various fees and fines, the report listed attorney fees "if appropriate." As in *Phillips*, we conclude that this recommendation along with all of the other recommendations provided ample notice that at sentencing, defendant could face the imposition of a prison term and various fees and fines, including an order to pay attorney fees. At the sentencing hearing, the court

[5] In *Viray*, we implicitly disagreed with *Phillips* only insofar as it held that the failure to object at sentencing forfeited claims of inadequate notice and hearing. Nothing in *Viray* suggests disapproval of its analysis concerning the adequacy or notice and the hearing.

considered and imposed such fees. Under the circumstances, the record does not support defendant's claim that there was no noticed hearing on attorney fees.

Next, we turn to defendant's claims that there was no evidence before the court concerning his ability to pay $200 in fees and that the record does not support a finding that he had the ability.[6] The probation report provided information that defendant had been living with his parents and regularly a working construction-type job, making $26, per hour for eight months prior to his arrest on October 22, 2007. The record also reveals that he was in custody after his arrest until sentencing on March 10, 2008. The evidence of defendant's construction job, the fact that he was living with his parents until his arrest, and the inference that once in custody, he would have no necessary expenses were all relevant concerning defendant's present ability to reimburse the county for attorney fees. Moreover, the evidence of employment indicated that during his eight months of employment, defendant could have earned up to $33,280 in gross income—i.e., 32 weeks times 40 hours per week times $26 per hour. In our view, this evidence supports a finding that defendant had the ability to pay the de minimus amount of $200 in fees.

IV. DISPOSITION

The order for attorney fees is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[6] Defendant does not claim that there is insufficient evidence to support the amount of the fees or the cost of defendant's representation.